IN THE

Supreme Court of the United States

OCTOBER TERM, 1904.

No. 162.

MRS. BEULAH SCHWEER AND
J. C. NORMAN, ... *Appellants*,

vs.

J. C. BROWN, Trustee for G. H. Schweer,
Bankrupt, ... *Appellee.*

RESPONSE TO MOTION TO DISMISS APPEAL.

Comes the appellant, Mrs. Beulah Schweer and J. C. Norman, appellants, herein and in response to motion by appellee to dismiss the appeal heretofore; to-wit, Nov. 7, 1904, granted.

1. Denies that there is no law of the United States authorizing this court to entertain jurisdiction of this appeal.

2. Denies that the appeal from the United States District Court is not such an appeal as is properly granted under the United States Statutes.

3. Denies that the question of jurisdiction is not properly certified from the court below.

4. Denies each and every cause assigned by appellee as appears from assignments numbered from one to ten inclusive.

5. Alleges that this being a summary action by a trustee in bankruptcy against a third person holding adversely against

bankrupt, could with the proposed defendant's consent, but not otherwise, be prosecuted in the District Court, and that courts jurisdiction was objected to on such grounds by demurrer based on Article "B" of Section 23 of the Bankrup'cy Act of 1898 properly presented to the court. This appeal therefore from the jurisdiction of the District Court, is based on Section 5 of the Act of Congress of March, 1891, known as the Everts Act, which provides, "Appeals or writs of error may be taken from the District Court or from the existing Circuit Courts direct to the Supreme Court in the following cases:

1. In any case in which the jurisdiction of the Court is in issue, in such case the question of jurisdiction alone shall be certified to the Supreme Court from the Court below for decision."

Wherefore Appellants pray appellees motion to dismiss the appeal herein be dismissed.

DAN W. JONES,
HARRY H. MYERS,
U. S. BRATTON,
Attorneys for Appellants.

BRIEFS FOR APPELLANTS RESPONSE TO MOTION TO DISMISS APPEAL.

This action was by J. C. Brown, Trustee in Bankruptcy of the estate of G. H. Schweer, bankrupt, against Mrs. Beulah Schweer and J. C. Norman to recover funds in their possession alleged to belong to the bankrupt estate, before the referree in bankruptcy. The appellants denied the jurisdiction of the court (Tr. 4) and on review by the Honorable District Court

affirming the finding of the referree, appellant prayed an appeal to the Supreme Court to determine the question of jurisdiction as follows Tr. 54—And they pray that this appeal be allowed and that a transcript of the records, papers and proceedings *pertaining to the jurisdiction* of this honorable court, upon which said order and decree was made, duly authenticated, may be certified to the Supreme Court of the United States, which appeal was on the 20th of Nov., 1903, granted.

The effect of Section 23 "B," is best given by quoting the head notes in Bardes & Hawarden Banks U. S. Supreme Court, May 28, 1900 (4 and B. R. 1631, 178 U. S. 524).

"1. The provision of the second clause of Section 23 of the Bankruptcy Act of 1898, control and limit the jurisdiction of all courts, including the several District Courts of the United States, over suits brought by trustees in bankruptcy, to recover or collect debts due from third parties, or to set aside transfers of property, alleged to be fraudulent, as against creditors, including payment of money or property to preferred creditors.

2. "The District Court of the United States can by the proposed defendants, but not otherwise, entertain jurisdiction over suits brought by trustees in bankruptcy to set aside fraudulent transfers of money or property, made by the bankrupt to third parties before the institutions of the proceedings in bankruptcy." This action being to recover from third parties money alleged to belong to bankrupt estate comes clearly under above decision, and the appeal was taken from the jurisdiction of the court. As to any special form of certificate from the trial court, this court in the case of Shield v. Cole-

man, 157 U. S. 176, speaking of such certificate says, "It is not necessary that the word certify be formally used. It is sufficient if there is a plain declaration that the single matter which is by the record sent up to this court for decision is a question of jurisdiction, and the precise question clearly, fully, and separately stated." In the case of Smith v. McKay, 161 U. S., the court says: "When in a case appealed from a Circuit Court, the record discloses that the defendants below appealed upon the express ground that the court erred in taking jurisdiction of the bill and in not dismissing the bill for want of jurisdiction, and prayed that their appeal should be allowed and the ***question of jurisdiction*** be certified to the Supreme Court, and that ***said appeal was allowed*** and the certificate further states that there is sent a true copy of so much of the record as is necessary for the determination ot the question of jurisdiction, and as a part of the record so certified is the opinion of the court below, in accordance with which defendant's motion to dismiss the case for want of jurisdiction was denied, it sufficiently shows that the appeal was granted solely upon the question of jurisdiction." In the Assignment of errors (Tr. 55) filed in case at bar, that question was raised as follows: 1. That the United States District Court in and for the Western Division of the Eastern District of Arkansas erred in holding that this court has jurisdiction to try the case. 2. That the United States District Court in and for the Western Division of the Eastern District Court of Arkansas, erred in not sustaining the demurrer as to the jurisdiction of this court, interposed by these defendants, appellants to the original complaint in said case.

In appellant's petition for appeal (Tr. 54) the following language was used: "Do hereby appeal to the Supreme Court of the United States for the reasons specified in the assignment of errors filed herein and they pray that the appeal be allowed and that a transcript of the records, papers and proceedings pertaining to the jurisdiction of this honorable court upon which said order and decree was made, duly authenticated may be certified to the Supreme Court of the United States." Upon the motion and the assignment of errors in both of which the matter of jurisdiction was alone raised and objected to this appeal was allowed and every essential requirement of the statute complied with.

Because the court saw fit to transmit the entire record, which discloses the demurrer against the jurisdiction of the court, and because the court's order granting this appeal, which was urged exclusively on account of the jurisdiction, but for reasons known to the trial Court, does not disclose this in particular words or a specified form, can it be argued these appellants are at fault? The petition for the appeal and the assignments of errors sufficently disclose that the jurisdiction alone was involved, even though the order, which reads as follows: "Tr. 54, Appeal allowed and returnable within thirty days and to act as a supersedaes upon execution of a supersedaes bond of $3,000 to be approved by me, signed by Jacob Trieber, Judge," does not in specific words certify the matter of jurisdiction alone was sent up for decision, we contend the prayer for appeal and order does this with sufficient clearness and directness to warrant such an appeal as is authorized by the statute referred to

and therefore the motion to dismiss should be dismissed and the matter of jurisdiction be decided.

DAN W. JONES,
HARRY H. MYERS,
U. S. BRATTON,
Attorneys for Appellants.